No. 76-917

In the Supreme Court of the United States

OCTOBER TERM, 1976

VICTORIA HORWATH AND ELIZABETH GAUDRY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-917

VICTORIA HORWATH, AND ELIZABETH GAUDRY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A16) is reported at 539 F. 2d 1093. The decision and order of the National Labor Relations Board (Pet. App. A1-A4) are reported at 219 NLRB 1019.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1976. A petition for rehearing, with suggestion of rehearing *en banc,* was denied on October 6, 1976 (see Pet. 2). The petition for a writ of certiorari was filed on December 31, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that the Union did not violate Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by seeking, pursuant to a maintenance-of-membership provision in its collective agreement with the Company, the discharge of certain employees because they had not paid union dues.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A17-A18.

STATEMENT

Since 1964, the Union[1] and Sunbeam Appliance Company, Division of Sunbeam Corporation (the "Company"), have been parties to an uninterrupted series of collective bargaining agreements covering the Company's employees. All of these agreements contained a "maintenance-of-membership" clause, requiring each employee who was a union member on the effective date of the contract, or who chose to join the Union thereafter, to remain a member of the Union in good standing during the life of the contract and while employed by the Company. Employees who were not union members on the effective dates of the contracts and newly hired employees were not required to join the Union (Pet. App. A6).[2]

---

[1]Lodge No. 1129, International Association of Machinists and Aerospace Workers, AFL-CIO, and International Association of Machinists and Aerospace Workers, District 8, AFL-CIO (Pet. App. A6).

[2]The 1964 contract contained an "escape clause," which permitted members to avoid the obligations of the maintenance-of-membership clause if they withdrew from the Union "during the escape period

The parties' 1970 collective bargaining agreement expired at midnight on January 12, 1973. Prior to its expiration, the Company and the Union entered into a new collective agreement, which became effective immediately upon the expiration of the 1970 contract. The new contract contained a maintenance-of-membership provision applicable to "[a]ll employees who [were] members of the Union on January 12, 1973" (Pet. App. A6-A7).

Prior to January 12, 1973, petitioners, as well as a number of other union members, submitted written resignations to the Union. Although the resignations stated that they were to be effective on or before January 13, 1973,[3] the employees continued to pay union dues until the 1970 contract expired (Pet. App. A7). Following notification by the Union that it would seek to have them discharged pursuant to the maintenance-of-membership clause if they did not resume paying dues, petitioners filed charges with the Board. The Company refused to discharge petitioners pending the outcome of the present proceeding (*ibid.*).

The Board found that petitioners were obligated by the maintenance-of-membership clause contained in the 1973 collective bargaining agreement to continue paying dues to the Union. The Board therefore concluded that the

---

immediately after midnight December 19, 1966 and before midnight on the 3rd day of January, 1967 [the last day of the contract]" (219 NLRB at 1022). The escape clause did not appear in any of the subsequent contracts (Pet. App. A6).

[3]The court of appeals accepted petitioners' contention that the effective date of the resignations was " 'as of the termination of the old contract at midnight, January 12' " (Pet. App. A7 n. 1).

Union had not committed an unfair labor practice in requesting petitioners' discharge for failure to pay dues (Pet. App. A4).[4] The Board stated (*id.* at A3-A4):

> Respondent threatened and sought to have the [petitioners] discharged solely because they had not paid their dues. Thus, the issue here is whether the [petitioners], by submitting resignations from [the Union], escaped the contractual obligation to pay dues. We find that they have not. The Board has long held that where, as here, there is no time lapse between successive collective-bargaining agreements and there are closely similar union-security clauses, of which maintenance of membership is one form, the union-security clauses have continuity and the new contract, at least as to union security, is to be treated as a continuation of the old contract. *International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW), AFL-CIO (John I. Paulding, Inc.),* 142 NLRB 296, 301 (1963). This principle was recently affirmed in *The Newspaper Guild of Brockton, AFL-CIO (Enterprise Publishing Company),* [201 NLRB 793]. Accordingly, we find that the 1973 contract herein, at least as to the maintenance-of-membership clause, is to be viewed as a continuation of the 1970 contract and that the obligation of the [petitioners] to abide by the clause and pay dues also continued.

---

[4]The Board rejected the recommendation of the administrative law judge that the dispute be referred to arbitration pursuant to the collective agreement between the Union and the Company because neither party to the arbitration would have supported petitioners' position (Pet. App. A3). The parties have not here sought review of that aspect of the Board's decision (see Pet. 19).

A divided court of appeals agreed with the Board that the complaint should be dismissed (Pet. App. A5-A16). In reaching that decision, the court found it unnecessary to reach "the soundness of the *Paulding* doctrine" (*id.* at A9) since, as the court of appeals pointed out, the maintenance-of-membership clause contained in the 1973 contract (*ibid.*; footnote omitted)—

> applies to all employees who were union members on January 12, 1973, which was the last day of the previous contract. Petitioners were union members on that date, since their resignations became effective at midnight on that date, when the previous contract expired. Accordingly, the provision plainly required that each petitioner maintain his union membership as a condition of continuing in his employment.

The court further held that the maintenance-of-membership provision contained in the 1973 collective agreement was not prohibited by Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). As the court pointed out (Pet. App. A13):

> Under an agency-shop provision, which [*National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734,] holds is sanctioned by §8(a)(3), all employees must pay dues, both those who are paying dues on the day a former contract expires and those who are employed thereafter. Under such a contract, no employee ever has a choice whether to support the union financially. Under the contract challenged here, each employee at some time had or will have such a choice. * * * Once the choice in favor of supporting the union is made, the employee's obligation is not different from the obligation imposed by an agency-shop provision.

ARGUMENT

Petitioners do not contend that maintenance-of-membership provisions, such as the provision at issue here, are unlawful *per se* (see Pet. 12). Rather, they contend that the maintenance-of-membership provision in the 1973 collective agreement between the Company and the Union is unlawful because it did not permit them to resign their memberships in the Union at the expiration of the 1970 agreement.[5] According to petitioners (*id.* at 5-7), their "right to resign" from the Union at that time was protected by Section 7 of the Act, 29 U.S.C. 157, as construed by this Court in *National Labor Relations Board* v. *Textile Workers Union*, 409 U.S. 213.

But Section 7 of the Act expressly provides that the right to refrain from concerted activity "may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." The first proviso to Section 8(a)(3) of the Act, 29 U.S.C.

[5]Petitioners apparently concede (Pet. 6) that the maintenance-of-membership provision contained in the 1973 collective agreement required them to remain dues-paying members of the Union as a condition of continued employment by the Company. They suggest, however, that "[i]f this Court decides that the Court of Appeals erred in its reliance on the literal timing of the [petitioners'] letters of resignation as the basis for upholding the Board's decision, it may have to confront the *Paulding* doctrine" (*id.* at 12). The *Paulding* doctrine refers to a series of decisions in which the Board has held that, even absent a specific contract requirement, successive union-security clauses are appropriately construed as imposing upon employees a continuing requirement of union membership if there is no hiatus between the expiration of one collective agreement and the effective date of the succeeding agreement (see Pet. App. A8-A9). Since, as the court of appeals correctly concluded, the maintenance-of-membership provision at issue here "is open to only one reading" (*id.* at A9)—requiring petitioners to remain members of the Union—there is no reason for this Court to consider the validity of the *Paulding* doctrine.

158(a)(3), authorizes "union shop" agreements, under which employees are required to join and remain members of the union as a condition of continued employment.[6] That authorization is limited in two respects, however, by the second proviso to Section 8(a)(3), which prohibits any employer from discriminating against an employee for nonmembership in a labor organization if he has reasonable grounds for believing either that (1) membership in the union was not available to the employee "on the same terms and conditions generally applicable to other members" or (2) "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Thus, as this Court recognized in *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734, 742:

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

The maintenance-of-membership provision contained in the 1973 collective agreement between the Union and the Company requires no more than is permitted by Section 8(a)(3) of the Act: that is, it requires petitioners to remain members of the Union for the duration of the 1973 agreement so long as they continue to be employed by the

[6]The first proviso to Section 8(a)(3) is qualified by Section 14(b) of the Act, 29 U.S.C. 164(b), which allows individual States and Territories to enact so-called right-to-work laws prohibiting union or agency shops. *Oil, Chemical & Atomic Workers International Union* v. *Mobil Oil Corp.*, 426 U.S. 407, 416-417.

Company.[7] However, the only obligation of that membership that may be invoked as cause for petitioners' discharge is the payment of dues to the Union. The fact that petitioners are covered by the maintenance-of-membership provision only because they chose at some time in the past to join the Union does not confer upon them a "right to resign" from the financial obligation that flows from that choice; the financial obligations owed by petitioners to the Union are no more than would be permitted were petitioners covered by an agreement containing a union or agency shop agreement. *National Labor Relations Board* v. *General Motors Corp., supra,* 373 U.S. at 741.[8]

---

[7]The record does not support petitioners' suggestion (Pet. 2, 8) that the Union and the Company "manipulated" the effective date of the maintenance-of-membership provision contained in the 1973 agreement. There is thus no basis for the contention (*id.* at 8-10) that the Company rendered unlawful assistance to the Union. In any event, that issue is not before this Court, since petitioners failed to raise it during the proceedings before the Board. See Section 10(e) of the Act, 29 U.S.C. 160(e); *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 255-256.

[8]We do not agree with the conclusion of the dissenting member of the panel below (apparently adopted by petitioners in this Court, but not raised by them in the court of appeals (see Pet. App. A14)) that, although a provision requiring all employees to pay dues to the Union would be valid, the provision at issue here offends the First Amendment because it is "selectively coercive" (*id.* at A16). As the majority of the panel noted (*id.* at A14):

> Where the only obligation of membership is payment of dues, it is no greater an intrusion on First Amendment rights to restrict an employee's ability to resign from membership than it is to require him to join in the first place. Whether an employee's First Amendment right to freedom of association has been violated by forcing him to support a union cannot depend on whether other employees are similarly coerced. * * *

The decision in *National Labor Relations Board* v. *Textile Workers Union, supra,* relied upon by petitioners (Pet. 6-7), is not to the contrary. As the court of appeals pointed out (Pet. App. A11):

> In the *Textile Workers* case the issue was whether it was an unfair labor practice for the union to attempt to fine employees who had resigned from the union during a strike and returned to work while the strike was still going on. Neither the constitution nor the by-laws of the union purported to restrict the right of a member to resign. The Court decided only that under these circumstances §7 protected the employees' right to resign and that once they had resigned the union had no right to attempt to control them. The case presented no issue concerning a union-security clause or §8(a)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

MARCH 1977.

DOJ-1977-03